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Supreme Court, U.S.
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No. 01-896

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY and
CITIBANK (SOUTH DAKOTA), N.A.,

Petitioners,

v.

JOHN B. McCAULEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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QUESTION PRESENTED BY THE COURT

Whether there is appellate jurisdiction when Petitioners, as the nominally prevailing party in the district court,[1] appeal the district court's dismissal of a complaint for lack of subject matter jurisdiction.

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1. Respondents/Plaintiffs do not understand as a factual matter how Petitioners are a nominally prevailing party in the district court. Other than the order appealed from, the only other order entered by the district court relevant to the issue here was one denying Petitioners' motion to dismiss the consolidated complaint under Fed. R. Civ. P. 12(b)(6). J.A. 110. In contrast, the dismissal of the consolidated complaint was done by the district court *sua sponte*, after briefing on class certification, and was unrelated to Petitioners' motion.

TABLE OF CONTENTS

	Page
Question Presented by the Court	i
Table of Contents	ii
Table of Cited Authorities	iii
Respondents' Supplemental Statement	1
Summary of Argument	2
Argument	2
I. If The Court Determines That The Appeal Was A Review Of A Remand Order, Appellate Jurisdiction Is Lacking	2
II. If The Court Determines That The Appeal Was A Review Of The Dismissal Of The Consolidated Action, Then There Is Appellate Jurisdiction	5
III. The Consolidated Complaint Does Not Supercede The State-Court Actions	8

TABLE OF CITED AUTHORITIES

Cases:

	Page
Anusbigian v. Trugreen/Chemlawn, 72 F.3d 1253 (6th Cir. 1996)	5
Archuleta v. Lacuesta, 131 F.3d 1359 (10th Cir. 1997)	5
Board of Managers of 2900 Ocean Ave. Condo. v. Bronkovic, 83 F.3d 44 (2d Cir. 1996)	5
Briscoe v. Bell, 432 U.S. 404 (1977)	4
Budget Rent-A-Car Inc. v. Higashiguchi, 109 F.3d 1471 (9th Cir. 1997)	6
Carney v. BIC Corp., 88 F.3d 629 (8th Cir. 1996)	5
Carr v. American Red Cross, 17 F.3d 671 (3d Cir. 1994)	6
Eyak Native Village v. Exxon Corp., 25 F.3d 773 (9th Cir. 1994)	9
Glasser v. Amalgamated Workers Union Local 88, 806 F.2d 1539 (11th Cir. 1986)	5
Gravitt v. Southwestern Bell Tel. Co., 430 U.S. 723 (1977)	3, 5
In re Ticketmaster Corp. Antitrust Litig., 929 F. Supp. 1272 (E.D. Mo. 1996)	9

Cited Authorities

	Page
International Primate Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72 (1991)	2
Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998)	9
Liberty Mut. Ins. Co. v. Ward Trucking Corp., 48 F.3d 742 (3d Cir. 1995)	5, 8
Morey v. Lockhart, 123 U.S. 56 (1887)	5
Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273 (9th Cir. 1984)	6
Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996)	3
Robertson v. Ball, 534 F.2d 63 (5th Cir. 1976)	5
Thermtron Products v. Hermansdorfer, 423 U.S. 336 (1976)	3, 4, 5, 6, 8
Things Remembered v. Petrarca, 516 U.S. 124 (1995)	3-4, 5
United States v. Rice, 327 U.S. 742 (1946)	4
Waco v. United States Fidelity & Guar. Co., 293 U.S. 140 (1934)	5, 6

Cited Authorities

	Page
Statutes:	
28 U.S.C. § 1291	1
28 U.S.C. § 1407	1, 9
28 U.S.C. § 1443	3
28 U.S.C. § 1447(c)	2, 3, 5
28 U.S.C. § 1447(d)	2, 3, 4
Rules:	
Fed. R. Civ. P. 12(b)(6)	i
Fed. R. Civ. P. 12(h)(3)	2
Other Authorities:	
Section 5 of the Judiciary Act of 1875, 18 Stat. 472	7, 8
The Act of Mar. 3, 1887, c. 373, 24 Stat. 553	7

RESPONDENTS' SUPPLEMENTAL STATEMENT

In each of the underlying actions, Plaintiffs filed their cases under state law asserting state law claims. Petitioners removed each case to federal court and petitioned the Judicial Panel on Multidistrict Litigation ("MDL Panel") to consolidate the cases for pretrial proceedings under 28 U.S.C. § 1407. J.A. 109. The MDL Panel granted the petition, plaintiffs consented to the transfer, and all cases were transferred to the Western District of Washington. J.A. 31-32.

In the Case Management Order proposed by the parties, the district court noted that the cases were "consolidated for pretrial purposes," and ordered that "a consolidated complaint" — if one was to be filed — must "be filed within fifteen (15) days after this Order becomes effective." J.A. 41, 44. To streamline the pretrial proceedings, Plaintiffs filed a single, consolidated complaint. J.A. 70.

After class discovery, and following two initial hearings, *sua sponte* the district court issued an order to show cause why the action should not be dismissed for lack of jurisdiction and why the six original cases "should not be . . . remanded to state court." J.A. 66. On October 29, 1999, the district court found that it lacked subject matter jurisdiction over the claims in the consolidated complaint, which it therefore dismissed, J.A. 91-101, and it then remanded to state court each of the six actions originally filed in state court and removed to federal court by Petitioners. J.A. 100-101.

The district court dismissed the consolidated complaint and indicated an intention to dispose of the federal action while remanding the cases back to their original state courts. J.A. 100-101, 124-126. Thus, the court of appeals concluded that the district court's decision was reviewable under 28 U.S.C. § 1291. J.A. 111-112.[2]

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2. The district court's order remanding the state actions is not before this Court, and the panel below concluded that it was not reviewable. J.A. 126.

The Ninth Circuit affirmed the dismissal of the consolidated complaint for lack of jurisdiction. The panel confirmed that it had jurisdiction to review the district court's order, which the panel construed as dismissing the consolidated action. J.A. 111-112.

SUMMARY OF ARGUMENT

Courts cannot review an order of remand that is based on a lack of subject matter jurisdiction. 28 U.S.C. § 1447(d). Courts do have the authority to review dismissals of actions, even those that are based on subject matter jurisdiction. Accordingly, if this Court concludes as the panel did that appellate jurisdiction is based on the dismissal of the consolidated action, even though it is predicated solely on lack of subject matter jurisdiction, then appellate jurisdiction may be proper.

ARGUMENT

I. IF THE COURT DETERMINES THAT THE APPEAL WAS A REVIEW OF A REMAND ORDER, APPELLATE JURISDICTION IS LACKING

A district court must remand a removed action when it appears to the court that it lacks subject matter jurisdiction. 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded").[3] Indeed, the Court has observed that "'the literal words of § 1447(c) . . . give . . . no discretion to dismiss rather than remand an action.' The statute declares that, where subject matter jurisdiction is lacking, the removed case 'shall be remanded.'" *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991) (citation omitted).

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3. *See also* Fed. R. Civ. P. 12(h)(3) ("Whenever its appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action.")

The very next subsection of the removal statute appears to bar all appellate review of remand orders. 28 U.S.C. § 1447(d) (except civil rights cases removed pursuant to 28 U.S.C. § 1443, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . ."). However, this Court has also stated "Section 1447(d) is not dispositive of the reviewability of remand orders in and of itself." *Thermtron Products v. Hermansdorfer*, 423 U.S. 336, 345 (1976). Thus, there are at least some remand orders that are reviewable. *See, e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (permitting review of remand order because the "District Court's abstention based remand order does not fall into either category of remand order described in § 1447(c), as it is not based on lack of subject matter jurisdiction or defects in removal procedure.")

Nevertheless, the interplay and command of section 1447(c) and 1447(d) are clear when a remand is based on a finding that the district court lacks subject matter jurisdiction.

> Title 28 U.S.C. § 1447(c) provides for remanding a removed action when the district court determines that "the case was removed improvidently and without jurisdiction"; and when a remand has been ordered on these grounds, 28 U.S.C. § 1447(d) unmistakably commands that the order "remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . ."

Gravitt v. Southwestern Bell Tel. Co., 430 U.S. 723, 723 (1977). As the Court explained in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), "§ 1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." *Things Remembered v. Petrarca*,

516 U.S. 124, 127 (1995). And, more recently, the Court reaffirmed this principle, emphatically stating:

> As long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction — the grounds for remand recognized by § 1447(c) — a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d).

Id. at 127-28. This bright-line rule applies "no matter how plain the legal error." *Briscoe v. Bell*, 432 U.S. 404, 414 n.13 (1977).

The purpose of denial of any review of remand orders is to prevent delay of the litigation that the removing party may achieve by seeking appellate reconsideration of a remand order. *United States v. Rice*, 327 U.S. 742, 751-52 (1946).

> There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues, . . . Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c), whether or not that order might be deemed erroneous by an appellate court.

Thermtron, 423 U.S. at 351 (citation omitted). In a very real sense, delay is exactly what Petitioners have already achieved. Other than one motion to remand that was withdrawn, Plaintiffs have never opposed any court, be it state or federal court, to hear the underlying claims; they simply desire them to proceed.

Here, because the district court's "remand order was plainly within the bounds of § 1447(c)"[4] — indeed remand was

4. Even if the Court were to construe the remand order as one made pursuant to R.P.J.P.M.L. 7.6, section 1447(d) would still apply. Section 1447(d) applies "not only to remand orders made in suits removed under [the general removal statute], but to orders of remand made in cases removed under *any other statutes*, as well." *United States v. Rice*, 327 U.S. at 752.

specifically made because the court found it lacked subject matter jurisdiction — the remand order is "unreviewable by the Court of Appeals, by mandamus or otherwise." *Thermtron*, *supra*; *Gravitt*, *supra*; *Things Remembered*, *supra*; *Morey v. Lockhart*, 123 U.S. 56 (1887); *Board of Managers of 2900 Ocean Ave. Condo. v. Bronkovic*, 83 F.3d 44 (2d Cir. 1996); *Liberty Mut. Ins. Co. v. Ward Trucking Corp.*, 48 F.3d 742 (3d Cir. 1995); *Robertson v. Ball*, 534 F.2d 63 (5th Cir. 1976); *Anusbigian v. Trugreen/Chemlawn*, 72 F.3d 1253 (6th Cir. 1996); *Carney v. BIC Corp.*, 88 F.3d 629 (8th Cir. 1996); *Archuleta v. Lacuesta*, 131 F.3d 1359 (10th Cir. 1997); *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539 (11th Cir. 1986).

II. IF THE COURT DETERMINES THAT THE APPEAL WAS A REVIEW OF THE DISMISSAL OF THE CONSOLIDATED ACTION, THEN THERE IS APPELLATE JURISDICTION

Here, the district court dismissed the consolidated action before remanding the actions back to their respective state courts. Leaving aside for one moment the reason for the district court's dismissal was for finding a lack of subject matter jurisdiction — one of the two reasons specified by Congress in section 1447(c) — this Court has held that dismissal of an action that precedes an order of remand is reviewable.

> [N]o appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. . . . We are of the opinion that the petitioner was entitled to have the Circuit Court of Appeals determine whether the dismissal of its cross-action . . . was proper.

Waco v. United States Fidelity & Guar. Co., 293 U.S. 140, 143 (1934). In *Waco*, the Court permitted review of the dismissal but not the order of remand. Moreover, the Court

did so to determine whether the dismissal of the cross-action against Fidelity was valid because the substantive decision in the district court was binding on the parties. *Id.* Similarly, courts have found appellate jurisdiction to review some remand orders when that review is predicated on a prior order that is reviewable. *See, e.g., Carr v. American Red Cross*, 17 F.3d 671, 682-83 (3d Cir. 1994); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 277 (9th Cir. 1984).

Accordingly, the panel was at least plausibly correct in asserting jurisdiction over the appeal as the district court dismissed the consolidated action. Specifically, the district court stated: "The consolidated complaint is hereby dismissed for lack of jurisdiction, and the six cases originally filed in state court, and removed to federal court by the defendants, are now remanded to state court . . ." J.A. 100. Of course, courts of appeal routinely review dismissals for subject matter jurisdiction. *See, e.g., Budget Rent-A-Car Inc. v. Higashiguchi*, 109 F.3d 1471 (9th Cir. 1997).

At the same time, Petitioners did not appeal the substantive decision on the merits of the action denying the motion to dismiss; instead, Petitioners appealed the dismissal of the consolidated action for lack of jurisdiction and remand order. This distinction seems to take this case out of the *Waco* line of decisions, as there is no substantive decision on the merits to review or any threat that some order of the court will be unreviewable at a later date. Furthermore, Plaintiffs are hard pressed to find any reason why appellate jurisdiction should be found here because historically courts were permitted to *dismiss or remand* the action to state court for lack of jurisdiction, as either decision achieves the same result without impacting the merits of the case. Indeed, as this Court has noted, "Section 1447(d) has its roots in the Act of Mar. 3, 1887, 24 Stat. 552. Prior to 1875, orders of remand were not reviewable by appeal or writ of error for want of a final judgment." *Thermtron*, 423 U.S. at 346. However, in 1875,

Congress enacted Section 5 of the Judiciary Act of 1875, 18 Stat. 472, which provided:

> That if, in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but *shall dismiss the suit or remand it to the court from which it was removed* as justice may require, and shall make such order as to costs as shall be just; but the order of said circuit court *dismissing or remanding* said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be.

(Emphasis added). Subsequently, in 1887, Congress repealed the provision contained in Section 5 of the 1875 Act providing for appellate review of and included a new provision that forbid review of remand orders. Specifically, The Act of Mar. 3, 1887, c. 373, 24 Stat. 553, provided in part:

> Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of

> error from the decision of the circuit court so remanding such cause shall be allowed.

Thus, "while not disturbing the provision for *dismissal or remand* for want of jurisdiction, [the Act] not only repealed the provision in § 5 of the 1875 Act providing for appellate review of remand orders but contained a provision that 'improperly removed' cases should be remanded" and that "no appeal or writ of error *from the decision* of the circuit court *so remanding* such cause shall be allowed." *Thermtron*, 423 U.S. at 346-47 (emphasis on "so remanding" in original, otherwise emphasis added).

The statutory history thus indicates that Congress has determined no review of the decision remanding the action is permissible when that decision is based on a lack of subject matter jurisdiction. The only question then is whether Congress intended to permit review of a *dismissal* for lack of subject matter jurisdiction when that dismissal is included with the decision to remand and is based on the very same grounds. Respectfully, and as much as Plaintiffs would like the Court to provide clear guidance on the amount-in-controversy issue presented, Plaintiffs cannot think of a good reason to permit such review. Indeed, an exception to permit review of dismissals based on subject matter jurisdiction when included in the same order as a remand order would swallow the rule and, contrary to Congress' intent, permit review of a remand decision based on the lack of subject matter jurisdiction. *See Liberty Mutual*, 48 F.3d at 748-49.

III. THE CONSOLIDATED COMPLAINT DOES NOT SUPERCEDE THE STATE-COURT ACTIONS

Petitioners erroneously contend that the consolidated complaint "supercedes the state-court actions." *See, e.g.*, Pet. Reply at 19. When the MDL panel transferred the cases to the Western District of Washington, it specifically instructed the district court to conduct "coordinated or consolidated pretrial proceedings with the action pending there." J.A. 32.

Indeed, such an Order is required when cases are transferred pursuant to 28 U.S.C. § 1407, as *pretrial* proceedings are all that Congress permits the transferee court to conduct in MDL proceedings. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). At the close of pretrial proceedings, the transferred cases *must* be remanded by the transferee court. *Id.* Although plaintiffs filed a "consolidated" complaint as expressly permitted by 28 U.S.C. § 1407, this streamlining did not, and could not, expand the jurisdiction of the district court or any court.

Petitioners' citation to *In re Ticketmaster Corp. Antitrust Litig.*, 929 F. Supp. 1272 (E.D. Mo. 1996), is inapplicable as: (i) all of the claims at issue were brought under federal antitrust law, and hence federal jurisdiction was not an issue; and (ii) that decision was a substantive dismissal (i.e., *on the merits*) which was therefore dispositive of the claims. Furthermore, *Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 780-81 (9th Cir. 1994), is equally inapplicable, because there the court was concerned with whether the consolidated class complaint joined all actions into a single action to thus make them removable *as a group*. Here, Petitioners' use of the citation goes to authority to review the issuance of a remand order. Indeed, the panel considered and repudiated Petitioners' argument stating:

> Ford and Citibank begin their argument with the premise that a consolidated complaint is "akin to an amended complaint," which "supersedes the original, the latter thereafter being treated as non-existent." *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). They thus contend that the consolidated complaint amended the original state complaints, rendering them "non-existent." However, they provide no authority for this proposition. The cases on which they rely merely stand for the unremarkable propositions that: (1) an amended complaint supersedes an original and (2) in a

consolidated action, a consolidated complaint is the operative pleading and supersedes all previously filed complaints. No authority supports the contention that a consolidated complaint touches or disturbs underlying state claims.

Nor is there anything cited to us in the record that demonstrates the district court meant for the complaints in the remand cases to disappear. On the contrary, the plaintiffs "consolidate" their efforts into one document which becomes the operative pleading. No court order did anything more than this. Once that umbrella complaint was dismissed, it left the underlying state removed complaints intact. Therefore, the district court did not exceed its authority in remanding the underlying removed actions to state court and, pursuant to section 1447(d), we lack jurisdiction to review its decision.

J.A. 126. There is nothing, by virtue of filing a consolidated complaint, that extinguishes the underlying state law complaints, nor could any order issued by a federal court without subject matter jurisdiction do so.

Respectfully submitted,

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